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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY TO MOTION TO DISMISS APPEAL AND TO SUGGESTIONS OF REGISTRAR AS TO JURISDICTION.

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FRANKLIN E. VAUGHAN,
Of Counsel.

BARNARD & MILLER PRINT, CHICAGO

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MAY IT PLEASE THE COURT:

The Registrar of Titles of Cook County, Illinois, averring that he never has been brought into court in this cause, has served appellants with a notice and copies of what is denominated a motion, the object of which is to obtain the dismissal of the appeal. He has accompanied his motion with "Suggestions" upon the question of jurisdiction, presumably in answer to appellants' "Statement as to Jurisdiction on Appeal" heretofore filed herein. Under the caption "Suggestions in Support of Motion," he has incorporated a lengthy letter to himself from the attorneys for

appellees. He has also injected unsupported statements as to the amount and quantity of lands in Cook County, Illinois (which is the only county in the State which has adopted said Act) which he asserts has been registered under the Torrens system. Without discussing the propriety of importing such matters into the record, we pass to our reply to those points involving the question of jurisdiction.

It is to be noted that the Registrar makes no attempt to sustain the constitutionality of the provisions of the Torrens Act here involved or to demonstrate that they do not infringe upon guaranties under the Fourteenth Amendment to the Federal Constitution, but confines himself to an attempt to show that appellants are not in position to raise the question on the ground that they must be held to have waived the right to do so by reason of the provisions of Section 46 of that Statute which, he claims, is binding upon them as a covenant running with the land to which they voluntarily subjected themselves.

I.

If the operation of the statute infringes upon guaranties under the Fourteenth Amendment, it may not be validated by claims of waiver or consent by reason of registration of the title to lands under the Act or the acquisition of lands already registered.

Hanover Ins. Co. v. Harding, 272 U. S. 494, 507.
Frost Co. v. R. R. Comm., 271 U. S. 583, 592-9.
Terral v. Burke Const. Co., 257 U. S. 529, 532.
Int. Paper Co. v. Mass., 246 U. S. 135, 141.
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Barron v. Burnside, 121 U. S. 186, 200.
Doyle v. Cont. Ins. Co., 94 U. S. 535.
Ins. Co. v. Morse, 87 U. S. 445, 451.

In the above cases, this Court effectually disposed of the contention that a person or corporation which had proceeded to act under and avail itself of the benefits granted by a statute, even where he or it has expressly waived specific rights by an instrument in writing, is barred or estopped from questioning the constitutionality of such Acts, which impose or require the waiver of rights or privileges guaranteed or secured to it under the Constitution or laws of the United States, as a price or condition for the exercise of a right or privilege granted by such a statute.

As this Court said in Frost Co. v. R. R. Comm., 271 U. S. 583, at page 594:

> "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

The Registrar has not refuted the principle above stated. He has, however, advanced an argument and cited authorities upon the general proposition that a person may, in *a specific instance*, relinquish or waive certain constitutional rights—a proposition which may be conceded, but one which is wholly inapplicable here.

For instance, a corporation may voluntarily agree, as to a certain, specific case, not to remove it to a Federal Court, or it may voluntarily agree to pay to the State a certain,

specific invalid and unconstitutional tax; but as held by this Court in the above cases, no such agreement or consent can be compelled or imposed by a State statute or implied merely from the acts of such corporation, proceeding under or in obedience thereto, nor can such corporation be held to have consented not to remove a case to a federal court or to pay an unconstitutional tax simply because it has proceeded under or availed itself of the privileges granted by such a Statute.

As this Court said in the case of Insurance Co. v. Morse, 87 U. S. 445, at page 451:

> "A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in *Cancemi's Case,* be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. *He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.*" (Italics ours.)

We think it apparent that the Registrar has failed to distinguish the principle laid down in these cases (which is the principle involved here) from the rule applied in the decisions cited and quoted by him.

II.

Assuming that any validity or effect can be given in this case to any supposed consent or waiver of constitutional rights, no consent or waiver can be implied in respect to the unauthorized action of the Registrar.

If it may be said that under Section 46 of the Statute, one registering title under the Torrens Act, or purchasing land already registered, thereby consents to be bound by the terms of the Act, whether violative of the Federal Constitution or not, such consent, we submit, applies not merely to one but to *all* of those terms. An owner cannot be said to consent to *unauthorized* acts of the Registrar. In the case of transfer of title, the owner consents that upon the presentation of *his own deed* to the Registrar, accompanied by *his* duplicate certificate of title, in accordance with the provisions of Sections 47 and 54, the Registrar may register the transfer and issue a new certificate, and that when *so* registered, such registration and such certificate shall have the force and effect prescribed by Sections 40 and 42 of the Act. He does not, however, consent that any registration of transfer or issuance of a certificate affecting his title which the Registrar may make without authority of the statute, based upon a *forged* deed or upon a blank piece of paper and in *contravention* of Sections 47 and 54, shall have the effect prescribed by Sections 40 and 42. *It is only such records and such transfers as are made pursuant to and under the authority of Sections* 47 *and* 54 *that are entitled to effect as evidence of title prescribed by Sections* 40 *and* 42, and it is to such *lawful* records and certificates, and *only* as to them, that he can be said to have consented.

III.

The sole question presented upon this appeal is the constitutionality of the Statute.

The Registrar asserts that whatever loss the appellants have suffered is attributable to their own negligence in permitting Napletone to obtain possession of their certificate of title.

At pages 12 to 14 of appellants' "Statement as to Jurisdiction on Appeal," we have already shown that, under this Statute, it was not within appellants' power to prevent the fraud perpetrated upon them and the loss of their title by retaining possession of their certificate of title.

We also showed that the Court below did not base its decision, independent of the Statute, upon any equitable ground or principle of general or local law that appellants should lose their title because of any negligence or other act on their part in suffering their certificate to get out of their possession.

As heretofore stated, the opinion contains no intimation that, independent of the provisions of Sections 40 and 42 (which sections as construed make the certificate issued to Napletone conclusive evidence of title in favor of appellees), the court would have decided adversely to appellants because they suffered Napletone to obtain possession of the duplicate certificate. To the contrary the opinion expressly states (Rec. 22) that the Wilborns "took a good title *unless the statute is unconstitutional.*" Therefore, the only ground on which rests the decision below is the constitutional validity of the statute as construed and applied in this case.

At page 10 of the Registrar's motion and suggestions, he quotes at length from the case of In re Bickel, 301 Ill. 484, 134 N. E. 76. No doubt inadvertently, he ends his quotation immediately preceding the sentence (same page) in which the Court, summing up, states *its* conclusion on this point, saying:

> "These general statements are the *ideal* which it was *hoped* the system would reach, but the practical question presented is how near the ideal may be approached in view of other established rules of property. *The certificate of title is not always entirely conclusive.* (*In re* Peters, 119 Minn. 96, 137 N. W. 390; Annotation, the Torrens Law, L. R. A. (1916D) 14 *et seq.*)" (Italics ours.)

In conclusion, we think it quite plain that to hold a certificate valid even though based upon a forged deed is coming very close to striking a death blow to the system. It is very clear that to the owner or purchaser of land it seems much more important that he may not lose it by a forged conveyance than that the evidence of title offered him as a prospective purchaser shall be conclusive. He can satisfy himself as to the latter matter for himself; but he can have no protection against the theft of his title if a forger can convey it to himself and then to a purchaser ignorant of the felony. If such a construction is ever given to the Torrens Act, it is safe to say that no one knowing of it will risk placing his title in such a precarious condition.

We again respectfully submit that the federal question here involved is a substantial one and that this Court has jurisdiction of this appeal.

Respectfully submitted,

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